

OGC HAS REVIEWED.

MEMORANDUM FOR: Executive Assistant to the Director

SUBJECT : Congressional Inquiries

1. The letter to the Times from Chanler asserts a position in regard to the relations between the Executive and the Legislative Branches of Government which is not exceptionable in its logic but difficult to assume in practice. The portion emphasized by red penciling, concerning the fact that if Senator McCarthy can call any official on the carpet such official becomes answerable to McCarthy as well as to the official's department head, is well put as far as it goes and is substantially the position we urged in the [redacted] case. However, even there, as you will recall, we did not deny the right of a congressional committee to subpoena witnesses in the course of committee investigations. The difficulty lies in the distinction between such a right and the propriety with which such a right is exercised.

2. Legally, refusal to honor a subpoena would subject the individual subpoenaed to prosecution for contempt. It would be a defense to say that the subpoena was not issued for a proper investigative purpose, but since the scope of investigations by the Congress is almost unlimited, it is extremely difficult to assert that the purpose of the subpoena is, in fact, outside the jurisdiction of the committee. The technicalities of such a contempt proceeding have never been taken to their ultimate issue, as in all cases arising from the time of President Washington on one side or the other has in the end receded. In essence, therefore, the problem is one of power politics. When a strong President has found himself in a strong position, he has, time and again, successfully defied the Congress. We have been aware of most of the examples cited by Mr. Chanler, but one not quoted by him is probably the best example of the power situation. At the time of President Theodore Roosevelt the Congress tried to subpoena certain records of one of the Executive departments which the President felt were none of their business. He ordered the records delivered to the White House and merely said now let's see if they can come and get them.

3. Of course, practically a contempt proceeding in a refusal to appear which had the backing of the President would become a moot point. The only person who can prosecute such a contempt

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is the Attorney General, and obviously he is not going to authorize prosecution under those circumstances. Consequently, the assertion of rights and powers of either side could be considered academic but for the political implications both of attempts to investigate and the refusal to testify. That is why no one is seriously debating the Stevens-McCarthy episode on a legal basis and why, on the other hand, it has such serious political repercussions. The whole difficulty lies in making sure that the Executive Branch is on sound ground when it takes its stand. In many of the historical cases the issue has been cut and dried, so it is relatively easy to determine who is in the right. When, however, the legislative agent shifts his ground or feels free to reverse his position, it is extremely difficult to draw the issue firmly and leaves him free to make whatever political capital is to be gained.

4. The Central Intelligence Agency has one slight advantage over most of the branches of Government, both legally and practically. Intelligence has traditionally been considered as part of or closely allied to the conduct of foreign relations which is in the exclusive jurisdiction of the Executive Branch. This has been recognized by the Supreme Court and in various political writings. Where the legislative seeks information concerning such foreign relations which the President considers classified, he is on sound ground in refusing the information (although not necessarily in refusing to honor a subpoena). If hypothetically the congressional committee asserted the right to control the President and his conduct of foreign affairs and tried among other things to control CIA, there is no question that the President would be right in refusing even to consider a congressional request. But, even in agencies concerned with foreign relations, the Committee on Government Operations has a perfectly legitimate interest in efficiency, economy, and similar aspects of the Executive Branch's operations.

LAWRENCE R. HOUSTON
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cc: Legislative Counsel
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